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91-1414

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October, 1992 Term

In the Matter of the Estate of Mary Evonuk, deceased.	)
NORMAN R. EVONUK,	)
Petitioner,	)
v.	)
SUSAN E. SHEKELL, JULIA CATHERINE LOWERY, MARGARET MARY LAY, and ESTATE OF EUGENE EVONUK,	)
Respondents.	)

PETITION FOR A WRIT OF CERTIORARI TO THE OREGON SUPREME COURT

NORMAN R. EVONUK'S PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

Whether a state court judge has jurisdiction to decide a case when the case, pursuant to 28 USC § 1441, has been removed to federal court and remanded back to the state court, but the remand order has been appealed to a U.S. Court of Appeals, and that court has not yet decided the appeal.

Whether a state court judge has jurisdiction to decide a case when the case, pursuant to 28 USC § 1441, has been removed to federal court and remanded back to the state court, but the 30 days for appealing the remand order have not yet expired.

List of Parties

The parties to this case are the following:

Norman Evonuk, Susan Shekell, Julia Lowery, the Estate of Margaret Lay, the Estate of Eugene Evonuk, Edward Evonuk, Ray Evonuk, Carol Sullivan, Paula Greif, Christine Ledgerwood, Stephen Evonuk, Philip Evonuk, Marian Rich, Hugh Evonuk, and Tom Evonuk.

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Previous Opinions

This matter began in the circuit court for Lane County, State of Oregon. That court, over Petitioner's objections, entered a final order without opinion. That order was appealed to the Oregon Court of Appeals, which affirmed without opinion. The matter was then taken to the Oregon Supreme Court, which denied review without opinion. Thus, there are no relevant opinions in this case.

Basis for Jurisdiction

The final order of the Lane County Circuit Court was entered June 6, 1990. The decision of the Oregon Court of Appeals, which affirmed the Lane County Circuit Court, was entered July 17, 1991. The Oregon Supreme Court denied review on November 26, 1991, and issued its appellate judgment on February 7, 1992. Jurisdiction is proper purusant to 28 U.S.C. § 1257.

Statutes at Issue

28 U.S.C. § 1441(a) states:

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

28 U.S.C. § 1443 states:

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the

United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

28 U.S.C. § 1447 states:

"(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

"(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

"(c) A motion to remand the case on the basis of any defect in removal

procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

"(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

"(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court."

Statement of Facts

This case involves the final distribution of the assets of the Estate of Mary Evonuk. Her will (filed with the Lane County court) distributes her assets in different proportions to five of her named children, one of whom is Petitioner. Mary encapsulates the intention of her will on page 4, Section V, which states:

> "each surviving child's receipts from the total 'EVONUK ESTATE" [be] absolutely and totally equal to those of every other surviving child of mine . . . ."

The problem with requiring that distribution from the entire "EVONUK ESTATE" be exactly equal is that distribution of Mary's Estate becomes irretrievably tied to the Estate of her husband, Peter Evonuk, who predeceased her. In fact, Mary's will, page one, includes within the "EVONUK ESTATE"

> "the property in the trust created by the Will of my husband, PETER EVONUK . . ."

and

> "the prior gift of real property made to our daughter, SUSAN E. SHEKELL."

Thus, in order to achieve the equality of distribution required by Mary's will, it first must be ascertained exactly how much property each of the children have received or will receive from the Peter Evonuk Trust. In other words, Mary's estate cannot be closed until Peter's Estate and the Peter Evonuk Trust are themselves first closed. As explained to the trial court by Petitioner,

> "it has been alleged by all the heirs that the distribution of the estate of Mary Evonuk cannot be accomplished until the estate of her husband, Peter Evonuk, is first closed." (Trial transcript at 5).

It is manifest that at the time of the trial court hearing the Peter Evonuk estate was not yet closed: Petitioner had petitioned for removal of the matter to the Federal District Court. Though

the District Court had since ordered the case remanded to the the Lane County Circuit Court, that remand order had been appealed, and the appeal was still pending. (Trial transcript at 6, 8).

Should Petitioner's appeal have proved successful, the Peter Evonuk estate would have remained in federal court. Thus, until that court had decided the manner of the estate's distribution, it was impossible to determine the share of each of the Evonuk children, and impossible to determine the equalizing share that each child was to receive under Mary Evonuk's will.

In addition to the complications posed by the Peter Evonuk Estate, there is a second and more basic reason for preventing closure of the Mary Evonuk Estate: like the Peter Evonuk Estate, it too was removed to federal court.

Removal took place by virtue of

Petitioner's petition, filed May 17, 1990. Notice of the removal and a copy of the petition was filed with the Lane County Circuit Court. Subsequently, the Federal District Court remanded the case back to Lane County (trial transcript at 4); however, at the time that the Mary Evonuk Estate was closed (June 6), Petitioner's 30-day appeal period had not yet expired. Thus, the Lane County Court acted without knowing whether the federal courts would maintain continuing jurisdiction; it acted before Petitioner had exhausted all of his rights to appeal.

Preservation of Error

On May 18, 1990, Petitioner filed in the Lane County Circuit Court, his "Objections," which stated, in part:

> "final distribution cannot be made in this case because the matter is currently under the jurisdiction of the United States District Court."

And the court ordered:

> "The Objections . . . filed by [Petitioner] are dismissed." (Order Approving First and Final Account of Successor Personal Representative and Decree of Final Distribution, at 2).

Subsequently, Petition appealed the Circuit Court's order to the Oregon Court of Appeals. In his opening brief, page 4, Petitioner stated:

> "The trial court erred in denying [Petitioner's] objections to the Petition for Decree of Final Distribution."

But the Court of Appeals, on July 17, 1991, decided the appeal as follows: "AFFIRMED WITHOUT OPINION."

Petitioner then sought review in

the Oregon Supreme Court. His petition for review, page 1, stated:

> "at the time that the Lane County Circuit Court closed the estate, it either lacked jurisdiction or should have declined to take jurisdiction; whichever the case, the order was in error."

However, on November 26, 1991, the supreme court ordered:

> "The Court has considered the petition for review and orders that it be denied."

Reasons for Granting the Writ

The Lane County circuit court should have refrained from making any order in this case while the matter was pending in the federal courts

Title 28 U.S.C. § 1441(a) states, in part:

> "any civil action brought in a State court of which the district court of the United States have original jurisdiction, may be removed . . . to the district court of the United States for the district and division embracing the place where such action is pending."

Upon a case's removal, jurisdiction over the matter rests with the federal court. As noted by Hyde Partners, L.P. v. Connolly, 839 F.2d 837, 841-42 (1st Cir. 1988),

> "In this case, therefore, removal was effected at 9:45 A.M. on December 22nd, when the last of the removal requirements was met. At that point, the jurisdiction of the state court 'absolutely ceased, and that of the [federal court] immediately attached.' Steamship Co. v. Tugman, 106 U.S. 118, 122, 1 S. Ct. 58, 60, 27 L.Ed. 87 (1882). . . . 'Every order thereafter made in that court was coram non judice, . . . Tugman, 106 U.S. at 122, 1 S.

> Ct. at 60. This is so even if it eventually is determined that removal was improper." (Emphasis added).

The question in the present case is not whether Petitioner had valid grounds for removal; it is not whether he sought removal in a timely fashion; and it is not whether his attempts to remove would ultimately have been successful. Those questions are all for the federal courts to decide, and without doubt, the federal courts would eventually have decided them. In reality, the two questions before this Court are whether Petitioner did, in fact, achieve -- even temporarily -- removal of his cases to the federal system and whether the federal courts still had or potentially still had control over the cases.

The answers to both are yes. When the Lane County court entered its order closing the estate of Mary Evonuk, the

time for appealing the remand order had not yet expired. Thus, the Lane County Court was effectively preempting Petitioner's rights under the removal statutes. More importantly, with respect to the Estate of Petitioner's father (closure of which was a prerequisite to closure of the mother's estate), the appeal of the remand order had already been filed and was at that time in process. There just was no way for the Lane County court to know whether it would ever have jurisdiction to enter orders in the case.

State courts should not be allowed to ignore the federal statutory scheme. Yet that is exactly what has happened in this case. This Court should therefore grant the writ of certiorari and reverse the Lane County Circuit Court.

Norman R. Evonuk
Petitioner Pro Se

Appendix

On November 26, 1991, the Supreme Court of the State of Oregon entered an Order in the case of Norman R. Evonuk, Petitioner, v. Susan E. Shekell, Julia Catherine Lowery, Margaret Mary Lay, and Eugene Evonuk Estate, Respondents, SC No. S38395, stating:

> "The Court has considered the petition for review and orders that it be denied."

The order was accompanied by this notation:

> "FADELEY, J., WOULD ALLOW."

On June 17, 1991, the Court of Appeals of the State of Oregon entered a decision in the case of Norman R. Evonuk, Petitioner, v. Susan E. Shekell, Julia Catherine Lowery, Margaret Mary Lay, and Eugene Evonuk Estate, Respondents, CA No. A65504, stating:

> "AFFIRMED WITHOUT OPINION."

On June 6, 1990, the Lane County

Circuit Court entered an "Order Discharging Personal Representative and Closing Estate" in the case of In the Matter of the Estate of: Mary Evonuk, Deceased, No. 50-83-03912, stating:

> "IT APPEARING to the Court that pursuant to an Order heretofore entered, the Successor Personal Representative has paid all outstanding claims and expenses of the administration, and has distributed the remaining assets of the estate to the persons entitled thereto, and that Receipts or other evidence thereof are on file herein; and
>
> "IT FURTHER APPEARING that the Successor Personal Representative has performed all of the acts required of her, and that this estate has been fully administered, and the Court being fully advised in the premises;
>
> "NOW, THEREFORE, IT IS HEREBY ORDERED that the Successor Personal Representative is discharged, her bond is exonerated, and this estate is closed."

On June 5, 1990, the Lane County Circuit Court entered an "Order Approving First and Final Account of Successor Personal Representative and Decree of Final Distribution" in the case of In

the Matter of the Estate of: Mary Evonuk, Deceased, No. 50-83-03912, stating, in pertinent part:

> "The Successor Personal Representative filed her First and Final Account and Petition for Decree of Final Distribution on the 27th day of April, 1990, and it appearing that Notice as required by law has been provided to the persons and institutions entitled thereto, and that Norman R. Evonuk filed Objections to said Account and Petition; and a hearing on said objections was held before this Court on the 5th day of June, 1990, and the Successor Personal Representative, Jill E. Golden, the Objector, Norman R. Evonuk, devisees Susan E. Shekell, Julia C. Lowery and Margaret M. Lay, and Edward Harms, Jr., attorney for the Estate of Eugene Evonuk appearing; and the Court having heard the arguments of the parties and counsel, and it appearing that the U.S. District Court has entered an Order dated May 24, 1990, remanding Norman R. Evonuk's Petition for Removal of this estate back to this Court (Case #90-6195-JO); and the Court being fully advised in the premises finds:
>
> "1. The objections filed by Norman R. Evonuk are without merit.
>
> ". . . . .
>
> "Upon filing Receipts or other evidence therefor, an Order will be entered closing this estate."